



September 19, 2002

Ms. Charlotte R. Mooney, Chief  
Generator & Recycling Branch (5301W)  
US Environmental Protection Agency  
Ariel Rios Building  
1200 Pennsylvania Ave, NW  
Washington, DC 20460

Dear Ms. Mooney:

The American Chemistry Council (ACC) endorses EPA's intention, announced both by Assistant Administrator Marianne Horinko and in the *Federal Register* on March 13, 2002 (67 Fed. Reg. 11252), to propose revisions to the definition of solid waste to begin to bring it into accord with the D.C. Court of Appeal's holding in *Association Of Battery Recyclers v. EPA (ABR)*. ACC has long supported the original goal of RCRA, to encourage "resource conservation and recovery," noting that with the maturity of the waste management program it is time for EPA to shift resources and attention to encouraging efficient and sustainable resource management. This is consistent with the global focus on sustainable development. Continuing to define material used for beneficial purposes – whether as sources of material or energy – as "waste" discourages and impedes the resource conservation purposes of RCRA. Such practices, as noted by the D.C. Circuit Court on more than one occasion, are beyond RCRA's jurisdiction to regulate only materials that are discarded. Using materials for their inherent value is not discard.

ACC was disappointed, however, to read in the March 2002 Federal Register notice of the Agency's intent to limit its definitional revision to "materials that remain in use in a continuous industrial process." To later learn of even further limitation that would require such materials to "remain within the generating industry," in our view, might indeed preclude current recycling. We have always maintained that such materials and activities are outside RCRA jurisdiction since they are clearly not discarded. We therefore urge EPA to expand the vision of what is achievable and to solicit public comment on some additional reform.

Specifically, ACC urges EPA to solicit public comments on three options.

1. A new regulatory structure based on defining "discarded material" as material that is "disposed of, thrown away or abandoned," but does *not* include "recycling" as an indicator of discard.
2. A new approach that recognizes that a material is recycled, and hence not a waste, when it is used or reused even when such use or reuse includes reclamation.



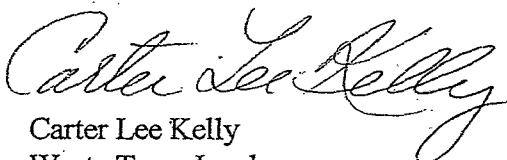
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3. A new self-implementing variance process that would allow for the recycling of waste (material not excluded by items 1 or 2 above) based on providing documentation that the recycling process is environmentally protective and meets established criteria defining legitimate recycling.

ACC believes that full implementation of the ABR decision and the court's previous applicable decisions, would exclude materials that are being legitimately used, and not "disposed of, thrown away or abandoned," from RCRA jurisdiction. We recognize that certain material streams that are used to produce a fuel, burned for energy recovery, or used to produce products applied to the land may raise complex issues for some stakeholders. However, ACC is hopeful that these issues will be addressed in the near future so that the significant potential resource conservation and recovery benefits that these materials represent can be recognized by the U.S. economy.

We appreciate your serious consideration of these recommendations. If you have any questions please contact Leslie Hulse ([leslie\\_hulse@americanchemistry.com](mailto:leslie_hulse@americanchemistry.com)) at 703 741-5165 or Kari Barrett ([kari\\_barrett@americanchemistry.com](mailto:kari_barrett@americanchemistry.com)) at 703-741-5219.

Sincerely,



Carter Lee Kelly  
Waste Team Leader

cc: Marianne Horinko  
Matt Straus

***Discarded materials are those disposed of, thrown away or abandoned.***

D.C. Circuit Court of Appeals in *Association Of Battery Recyclers v. EPA* (ABR) 208 F3d 1047 (D.C. Cir. 2000) (ABR) addressed materials that were being continuously recycled within the generating industry. However, the court's holding went beyond this. Specifically the ABR court restated its finding in an earlier case (*Amer. Mining Cong. v. EPA*, 824 F.2d 1177 (DC Cir 1987) (AMC I) that the statutory term "discarded material" and hence solid waste is limited to material that is "disposed of, thrown away or abandoned." Current regulations at §261.2 explicitly designate certain materials as discarded solely because they are destined for a recycling process. EPA seeks comment on means to resolve this seeming discrepancy between the statute, as interpreted by the court, and the current regulations. Specifically, we solicit comment on means to restructure §261.2 to define "discarded materials" explicitly as materials that are "disposed of, thrown away or abandoned" and which elements of the current regulations would and would not meet this new definition. In addition, we request comment on the following criteria for differentiating between legitimate and "sham" recycling. [EPA to add legitimacy criteria.]

***A material is recycled, and hence not a waste, when it is used or reused to make a product, even when such activities require reclamation.***

When the court has found materials to be outside RCRA jurisdiction because they are "destined for reuse in an ongoing industrial process," it has not distinguished between materials reused directly and those that are processed to derive a component product that is useful in another industrial process. The study of industrial ecology helps to identify opportunities for more efficient and sustainable use of resources, including potential opportunities that can be discouraged by unnecessarily determining an activity to be "waste management," as we have done with many instances of reclamation. EPA asserted RCRA jurisdiction over reclamation in light of past abuses – abuses that are more improbable now with the development and maturation of the full panoply of environmental regulation. Such activities went largely unregulated twenty years ago, but are now regulated as any other manufacturing operation—including regulation under RCRA of any material discarded by the reclamation operation. We therefore solicit public comment on removing all materials destined for reclamation from the definition of "discarded material." Such a revision of the regulations would establish the point of generation of a waste at a point after, rather than before, a reclamation activity.

***Self-implementing variance process for legitimate waste recycling***

The heterogeneity of manufacturing activities and the continued development of new processes and applications may create some ambiguity concerning the applicability of any regulatory definition of discard or recycling legitimacy criteria. In addition, while EPA also encourages new beneficial uses for materials that are wastes, we acknowledge that the current rules create barriers to environmentally sound recycling of these materials. That is why the current variance process was created at §260. However, we also recognize that the current process by which companies petition for exemptions from the definition of solid waste is both time consuming and resource intensive; for the applicant and the Agency. We seek comment on a new variance process whereby a party recycling a waste in an environmentally sound manner could submit an explanation of the recycling process to the agency of jurisdiction (EPA or a state). The variance would be deemed granted if the agency of jurisdiction registered no objection within a prescribed time period.